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DECLARATIONS CONCERNING MENTAL STATE. — In the present state of change in the law one may expect to find the rules of evidence being unwittingly bevelled off and whittled away wherever they appear to impede unnecessarily the path to truth. But even so, the decision of the English House of Lords in *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.*, [1914] A. C. 733, is somewhat disquieting in the results to which it seems to lead. In that case one alleged to be an illegitimate posthumous child of a deceased workman was suing for compensation for the death of his father as a dependent under the English Workmen's Compensation Act.[1] Declarations of the deceased to the mother and to others, admitting that he was the father of the child, and declaring his intention to marry the mother, were held admissible to prove paternity and dependency.[2]

[1] 6 Edw. VII., c. 58.

[2] The county court judge had ruled that the declarations were admissible as admissions against the pecuniary interest of the deceased. The Court of Appeal reversed him on this point. Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130. The House of Lords, without disapproving the reasoning of the Court of Appeal, held that the declarations were admissible on the grounds discussed *infra*. It is interesting to note the strictness of the House of Lords in treating the exception as to admissions against interest, while at the same time apparently throwing wide the gates under the other exception. In view of the father's statutory duty to support his illegitimate child, his pecuniary interest would seem to be sufficiently close to warrant the admission of the declarations on that ground. Halvorsen *v.* Moon & Kerr Lumber Co., 87 Minn. 18, 91 N. W. 28. Certainly the arbitrary limitations placed upon this exception by the Court of Appeal seem undesirable.

Under the English Workmen's Compensation Act dependency is a question of fact, turning upon the question, whether there was "a reasonable anticipation that the applicant would be maintained by his father." [3] Upon this issue the deceased's intention to marry the girl and provide a home for her and the child was clearly relevant, and under the rule of *Mutual Life Ins. Co.* v. *Hillmon* [4] contemporaneous declarations by the deceased were admissible to prove that intention. In admitting the declarations on this issue, therefore, the House of Lords were, in effect, only applying an exception to the hearsay rule already well recognized, although not universally accepted, in this country.

But of the four lords who read opinions in the House, Lord Moulton alone seemed disposed to confine the admission of the declarations to the issue of dependency.[5] The three others go the full length of admitting the evidence on both issues. Their reasoning on the issue of paternity, as on the other issue, appears to be, that the mental attitude of the deceased toward the mother and her unborn child was relevant upon the issue of whether he was the father of the child, and that mental attitude could be shown by contemporaneous declarations.[6] If their lordships mean by this that declarations are admissible to prove a contemporaneous state of mind merely because that state of mind logically tends to prove a material existing fact, are they not making the exception to the hearsay rule as broad as the rule itself? If A.'s promise to marry B., or his statements to others indicating his belief that he is the father of B.'s child (and the opinions in the principal case make no distinction), are admissible to prove that belief, and that belief is admissible to prove paternity, why is not A.'s direct statement, "I am the father of B.'s child," admissible for the same purpose? And if that is so, what declarations are not admissible? [7] If, on the other hand, they mean, as may be inferred from Lord Atkinson's opinion,[8] that any

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[3] New Moncton Collieries, Ltd. *v.* Keeling, [1911] A. C. 648; Schofield *v.* Orrell Colliery Co., Ltd., [1909] 1 K. B. 178, affirmed [1909] A. C. 433. The court so treated it in the principal case. [1914] A. C. 733, 751, [1913] 2 K. B. 130, 143. The act expressly includes illegitimate children under possible dependents. Sec. 13.

[4] 145 U. S. 285. "Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations." Gray, J., p. 295. Accord, Commonwealth *v.* Trefethen, 157 Mass. 180, 31 N. E. 961; and cases collected in 3 WIGMORE, EVIDENCE, § 1725, n. 1; SUPPLEMENT, § 1725, n. 1. *Contra*, Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269. But see Burton *v.* Wylde, 261 Ill. 397, 103 N. E. 976. See also 27 HARV. L. REV. 761. It is doubtful how far this exception has been recognized heretofore in the English courts. See Rex *v.* Thomson, [1912] 3 K. B. 19; PHIPSON, EVIDENCE, 66.

[5] The four lords were Earl Loreburn, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Moulton, no one of whom is an English common-law judge.

[6] It may be that the English law recognizes a special exception to the hearsay rule as to declarations of the alleged parents in all cases in which the question of legitimacy or paternity is in issue, even when these declarations are not so connected with conduct as to be a part of the *res gesta*. See 1 WIGMORE, EVIDENCE, § 269 and cases there cited. The Aylesford Peerage, 11 A. C. 1. But see Legge *v.* Edmonds, 25 L. J. Ch. 125.

[7] For a full and careful discussion of this question see an article by Mr. Eustace Seligman, 26 HARV. L. REV. 146.

[8] "The proposal to marry and the acceptance of it may, of course, be made by word of mouth, but the making and the acceptance of it are acts, matters of conduct,

conduct, verbal or non-verbal, which affords a strong circumstantial inference [9] to the truth of an existing fact, apart from the credit of the speaker or actor, is admissible to prove that fact, and not within the hearsay rule at all,[10] are they applying an existing rule, or are they making a new one? And if this is their meaning, is clearness of thought likely to be promoted by cloaking the result, as Lord Shaw does,[11] in the obscurity which surrounds the term *res gestæ?* [12]

The common law so feared the misuse of hearsay evidence by the jury that it excluded all declarations which might induce that body to accept the credit of someone not a witness under oath and subject to cross-examination.[13] Under the exception to this rule as applied in the *Hillmon* case,[14] the only thing that can possibly be taken on the credit of the declarant is the existence of the mental state, and the exception recognizes the necessity of proving this by hearsay evidence.[15] The inference from the mental state to the future act is solely circumstantial with no possibility of the jury taking the truth of that fact on the credit of the declarant. Where, however, the mental state is offered to prove an existing fact, the inference is not solely circumstantial, but there is grave danger of the jury's taking the truth of the fact on the credit of the declarant. In other words, the objection is not to the proof of the mental state, but to the use which is made of it after it is proved.[16] The logical result of the opinions in the House of Lords would seem to be, that wherever the circumstantial inference is sufficiently strong, the danger of the misuse of the evidence by the jury will be disregarded, and the declarations will be admitted. This may be a desirable result,

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and strong pieces of evidence on the issue of paternity, inasmuch as they show the character in which the parties regarded the child *en ventre sa mère*, and desired to treat it." Lord Atkinson, p. 740.

" [The] significance [of these declarations] consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the child." Lord Atkinson, p. 741.

[9] For a discussion of the distinction between a circumstantial and a testimonial use of evidence, see 26 HARV. L. REV. 151, 152.

[10] Both Professor Wigmore and Mr. Phipson seem to hold a similar view as to such declarations when admitted merely to prove a mental state, itself in issue. 3 WIGMORE, EVIDENCE, §§ 1715 *et seq.*; PHIPSON, EVIDENCE, pp. 50 *et seq.* Mr. Taylor also considered such declarations as entirely outside the hearsay rule. TAYLOR, EVIDENCE, §§ 580 *et seq.* But see GULSON, PHILOSOPHY OF PROOF, pp. 315, 316. The court in Commonwealth *v.* Trefethen, *supra*, were troubled by similar considerations. 157 Mass. 180, 188, 31 N. E. 961, 964. See also Cornelius *v.* State, 12 Ark. 782, 807.

[11] "In a question of *status*, I am of the opinion that such statements, proved to have been made at the time and in the circumstances such as occurred in the present case, are part of the *res gestæ* equally with actual contracts entered into by the deceased or conduct apart from words, both of which contracts and conduct could undoubtedly have been proved." Lord Shaw of Dunfermline, p. 748.

[12] For a discussion of the confusion in the law with regard to the use of this term and the exception it is erroneously used to describe, see THAYER, LEGAL ESSAYS, 207; PRELIMINARY TREATISE ON EVIDENCE, 522, 523; 3 WIGMORE, EVIDENCE, §§ 1745–1797.

[13] See THAYER, LEGAL ESSAYS, 266; PRELIMINARY TREATISE ON EVIDENCE, 518, 519; CASES ON EVIDENCE, 2 ed., 310, n. 1; PHIPSON, EVIDENCE, 211; 26 HARV. L. REV. 153.

[14] Mutual Life Ins. Co. *v.* Hillmon, *supra.*

[15] See 3 WIGMORE, EVIDENCE, § 1714.

[16] THAYER, CASES ON EVIDENCE, 2 ed., 670, n. 1; LEGAL ESSAYS, 265; 1 WIGMORE, EVIDENCE, § 267.

but it involves a judicial recasting of the hearsay rule, not avowed, nor, apparently, recognized by the Law Lords, and within the scope of legislation rather than judicial decision.[17]

THE LIABILITY OF A RE-INSURER. — A recent case in the Court of Appeal marks an important step in the development of the English law of re-insurance.[1] A guarantee society which had re-insured one of its risks, was unable to meet the liabilities arising under this guarantee. It was held that the basis for calculating the re-insurance company's obligations to the guarantee society was not the rateable sum which the guarantee society was able to pay, but was the actual liability of the guarantee society. *In re Law Guarantee Trust and Accident Society, L.*, [1914] W. N. 291.[2] Although this result is supported by the weight of American authority,[3] its adoption by a new jurisdiction must be viewed with regret. It is submitted that there is no ground upon which the rule can be reconciled with the principle that insurance is essentially indemnity.[4] If the re-insurer's payment of the insurer's full liability were handed over intact to the original insured, who sustained the loss, there could be no objection on this score.[5] But it is properly held in most jurisdictions that the original insured has no claim upon the proceeds of the re-insurance policy as such.[6] Consequently if an insolvent

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[17] There is, nevertheless, a tendency in some courts and text writers, of whom Professor Wigmore is an eminent example, to approach the hearsay rule from an *a priori* viewpoint. The late Professor James B. Thayer was without doubt the leading exponent of the historical treatment of the rule. PRELIMINARY TREATISE ON EVIDENCE, 522, 523. This difference in attitude seems to explain the conflict of opinion concerning the extent of the exception here under discussion. For a good contrast of the two viewpoints compare the opinions of Sir George Jessel and Lord Justice Mellish in Sugden *v.* Lord St. Leonards, 1 P. D. 154.

[1] The development of the English law of re-insurance was retarded by the Statute of 19 GEO. II, c. 37, § 4 (1746), prohibiting such contracts. It was not repealed until 30 & 31 VICT., c. 23 (1868).

[2] In one previous case the re-insured was allowed to recover more than his loss, but the only point argued was whether payment of the loss was a condition precedent to recovery. *In re* Eddystone Marine Ins. Co., [1892] 2 Ch. 423.

[3] The American law was established by Hone *v.* Mutual S. Ins. Co., 1 Sandf. (N. Y.) 137 (1847), aff'd *sub nom.*, Mutual S. Ins. Co. *v.* Hone, 2 N. Y. 235, following two Marseilles Commercial Court cases. (See EMERIGON ON INSURANCES, Meredith's ed., c. 8, § 14.) Accord, Norwood *v.* Resolute F. Ins. Co., 47 How. Pr. (N. Y.) 43; Blackstone *v.* Allemania F. Ins. Co., 56 N. Y. 104; Fame Ins. Co.'s Appeal, 83 Pa. St. 396; Goodrich & Hick's Appeal, 109 Pa. St. 523; Consolidated, etc. Ins. Co. *v.* Cashow, 41 Md. 59; Strong *v.* American, etc. Ins. Co., 4 Mo. App. 7; see Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 297; Cashaw *v.* N. W. National Ins. Co., 5 Bliss (U. S.) 476; Providence, etc. F. Ins. Co. *v.* Atlanta, etc. F. Ins. Co., 166 Fed. 548. *Semble*, *In re* Republic Ins. Co., 20 Fed. Cas., No. 11,705; Allemania Ins. Co. *v.* Firemen's Ins. Co., 209 U. S. 326. *Cf.* n. 14 *infra*.

[4] MAY, INSURANCE, 4 ed., § 2.

[5] Where the policies of one insurance company are assumed by another, the policyholders may recover against the latter on the principle of Lawrence *v.* Fox, 20 N. Y. 268: Johannes *v.* Phœnix Ins. Co., 66 Wis. 50; Glen *v.* Hope M. Ins. Co., 56 N. Y. 379.

[6] Herckenrath *v.* American M. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Consolidated, etc. F. Ins. Co. *v.* Cashow, *supra;* Goodrich & Hick's Appeal, *supra*. One case gives the original insured a right to the proceeds of the policy on the analogy of the creditor's